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IN THE

Supreme Court of the United States

Term, 1973.

No. 72-1514

JOHN L. STERR,

Petitioner,

vs.

DAVID B. KELLY, Superintendent, Division of State Police of the State of New Jersey.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

John L. Sterr, your Petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in the above entitled case on January 22, 1973, and denial of petitioner's petition for rehearing on February 13, 1973.

OPINIONS BELOW.

The opinion of the Supreme Court of New Jersey reported at 62 N. J. 105 (1973), is reproduced in Appendix A hereto, infra, page 1a.

The opinion of the Superior Court of New Jersey, Appellate Division, reported at 119 N. J. Super. 272 (App. Div. 1972) is reproduced in Appendix A hereto, infra, page 6a.

JURISDICTION.

1. The judgment of the Supreme Court of New Jersey entered January 22, 1973, (infra, Appendix A, page 1a). It is final by its terms.

2. The federal question was raised in the original court-martial proceeding (T7-23 et seq.); in the petitioner's Appellate Division brief (p. 11, l. 30); in the petition for certification to the New Jersey Supreme Court (p. 3). All of the above material has been submitted as part of the record.

3. The jurisdiction of this Court is invoked under 28 U. S. Code 1257(3).

QUESTIONS PRESENTED.

The questions presented are:

1. Was not, under the circumstances of this case, the denial of a public court-martial to petitioner a denial of the due process of law guaranteed him in a state proceeding by the Fourteenth Amendment of the United States Constitution?

2. Was not the use of unsworn factual material by the New Jersey Supreme Court a violation of due process of law to petitioner?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "nor shall any State deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE.

The basic factual circumstances in this matter involved the brutal murder of two college girls in Somers Point, New Jersey, on Memorial Day, 1969. Petitioner, a New Jersey State

Trooper, was assigned to daylight patrol of the Garden State Parkway on that day. He discovered a car along the side of the Parkway, which much later was identified as being owned by one of the girls. The bodies of the girls were not discovered until June 2, 1969, in the woods several hundred feet from where Sterr found the car. The murders of the girls remain unsolved.

After an intensive and detailed investigation of procedures followed by the State Police, charges were made against some members of that organization, including petitioner.

Trooper Sterr was tried by a Summary Court-Martial on a charge listing three specifications. The trial was held on December 29, 1970, January 12, 1971, and March 2, 1971. The specifications charged failure to make an entry regarding towing of an abandoned car, failure to enter a telephone call in a Station Record, and failure to send a teletype message after locating an abandoned car (even though the teletype was inoperable). Trooper Sterr was found guilty on each specification of the charge and was sentenced to be suspended without pay and allowances for a period of two weeks.

Throughout the summary court-martial, Trooper Sterr, through his counsel, repeatedly requested that the proceedings be opened to the public. All such requests were denied because of "tradition".

Tremendous amounts of newspaper, television and radio publicity surrounded both the investigation of the murders and the court-martial of petitioner.

The sentence imposed by the court-martial was stayed pending appeal to the New Jersey Superior Court, Appellate Division. That Court, in an opinion reported at 119 N. J. Super 272 (App. Div., 1972), held that there was no right to a public court-martial.

Plaintiff petitioned the New Jersey Supreme Court for certification of the issue, which was granted, 61 N. J. 162 (1972). The Court affirmed the decision of the Appellate Division, 62 N. J. 105 (1973). Application was made to the United States

Supreme Court for a stay pending filing of a Petition for Certiorari. This request for stay was denied.

Petitioner has also filed a civil rights complaint in the United States District Court for New Jersey under authority of 42 U. S. C., par. 1983. The District Court has denied an application for a preliminary injunction and has dismissed Sterr's complaint.

REASONS FOR GRANTING THE WRIT.

Petitioner believes that this case squarely presents an issue which has never been adjudicated and which should be determined. That issue involves the interpretation of procedural due process in a State Police court-martial proceeding.

In discussing this issue, the New Jersey Supreme Court held, "Considering the type of hearing here involved, the subject matter thereof together with the rights at stake, we conclude that due process did not require a public hearing."

However, the Court in arriving at that decision relied in large part on a lack of specific provisions for public hearings in the Federal Administrative Procedure Act, 5 U. S. C. A., par. 551, et seq. The New Jersey Supreme Court overlooked the recent decision in the case of *Fitzgerald v. Bampton*, 467 F. 2d 755 (1972), wherein it was held that due process required a public hearing by administrative agencies acting quasi-judicially.

Petitioner's request for a grant of certiorari is also based on a denial of fundamental due process at the very end of the state proceedings. As is indicated by petitioner's motion for re-hearing before the New Jersey Supreme Court, much of that Court's opinion was based on an unsworn letter from the Superintendent of the New Jersey State Police, and in fact, contained many verbatim quotes from that letter.

The New Jersey Supreme Court denied petitioner's motion for a re-hearing on the basis that no objection was made to the submission of the written statement, and that an answer to it was filed. No objection was made because there was no inference by the Court that this statement would form the foundation of the Court's opinion. A careful reading of that opinion indicates that the Court would have ruled petitioner was entitled to a public hearing, but for the reasons outlined in the letter and incorporated wholesale in the opinion.

> "Therefore, absent a showing of good cause or sufficient reason for keeping a hearing private, the general policy favors an open administrative hearing . . . particularly if the person involved requests it." 62 N. J. 105 at 108.

Because of the anamolous situation where petitioner's court-martial was surrounded by great publicity, but no actual coverage of the proceeding itself, petitioner is under a great stigma. The knowledge that the charges against him arose because of a double murder leaves the inescapable implication that his alleged dereliction allowed the murderer to escape. Had the court-martial been public, there would be no such stigma.

CONCLUSION.

The denial of a public court-martial denied petitioner due process of law as did the use of unsworn factual material by the New Jersey Supreme Court for the basis of its opinion.

Respectfully submitted,

PATRICK T. McGAHN, JR., for
McGAHN and FRISS,
Attorneys for Petitioner.

APPENDIX A.

OPINION OF SUPREME COURT OF NEW JERSEY

(Filed January 22, 1973).

Argued December 4 and 5, 1972. Decided January 22, 1973.

On appeal from the Superior Court, Appellate Division.

MR. PATRICK T. McGAHN, JR., argued the cause for appellant (MESSRS. McGAHN and FRISS, attorneys).

MR. MICHAEL R. PERLE, Deputy Attorney General, argued the cause for respondent (MR. GEORGE F. KUGLER, JR., Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by
SULLIVAN, P. J. A. D., temporarily assigned.

Defendant John L. Sterr, appellant herein, a trooper in the service of the New Jersey State Police, was charged with violation of certain departmental rules and regulations while in the performance of his assigned duties.

He received a departmental hearing (summary court trial) before an officer designated by the Superintendent of the State Police, was found guilty and was suspended without pay and allowances, for a period of two weeks. The Appellate Division affirmed in an opinion reported at 119 N. J. Super. 272 (1972).

Certification was granted, 61 N. J. 162 (1972), to review defendant's contention, rejected at the summary court trial as well as by the Appellate Division, that defendant had a constitutional right to an open or public hearing on the departmental charges against him.

Basically, defendant argues: (1) A New Jersey Police summary court trial is a quasi-judicial proceeding and "is subject to standards of fair and adequate procedure constituting due process, one of which is a public hearing"; (2) it is not enough that defendant was afforded the right to be represented by counsel, the right to call witnesses, and the right of judicial review. Since a summary court trial is "very similar to a criminal prosecution," with penal and punitive aspects, no good reason exists for denying defendant the right to a public trial guaranteed to every accused in a criminal prosecution; (3) a closed hearing always increases the likelihood of "command influence," particularly in a para-military organization such as the State Police where promotions are determined by those in command, a fact quite evident to the hearing officer who presided at defendant's trial.

Defendant's contention that a summary court trial should be analogized to a criminal prosecution thereby bringing him within the ambit of *N. J. Const.*, Art. I, par. 10 is without merit. The sole inquiry at defendant's departmental hearing was whether or not defendant-trooper had failed to properly carry out his assigned duties. This was not a criminal prosecution in any sense of the word and the constitutional safeguards guaranteed an accused in a criminal prosecution are not applicable.

Defendant's further contention that administrative due process requires a public hearing is also without merit. Due process is not a rigid concept. Its flexibility is in its scope once it has been determined that some process is due. It calls for such procedural protections as the particular situation demands recognizing that not all situations calling for procedural safeguards require the same kind of procedure. *Morrissey v. Brewer*, 408 U. S. 471, 33 L. Ed. 2d 484 (1972). Relevant considerations are the

public interest, the rights involved and the nature of the proceeding. The manner of holding and conducting the hearing may vary. As long as principles of basic fairness are observed and adequate procedural protections afforded, the requirements of administrative due process have been met. In *Laba v. Newark Board of Education*, 23 N. J. 364, 382 (1957) we said: "Absent specific legislative direction, the administrative tribunals may mold their own procedures so long as they operate fairly and conform with due process principles."

Our Administrative Procedure Act, *N. J. S. A.* 52:14B-1, et seq., which applies to State Police summary court trials, is silent on the matter of whether or not an administrative hearing should be public. The Rules and Regulations for the discipline and control of the State Police, (adopted by the Superintendent pursuant to *N. J. S. A.* 53:1-10), although they set forth in detail the manner in which a disciplinary hearing shall be held and the rights and privileges accorded an accused, make no mention that the hearing shall be open to the public. New Jersey Civil Service Rule, *N. J. A. C.* 4:1-5.10(a), provides that "[h]earings not required by law to be open to the public may be held open or closed to the public, as the Commission may determine." The Federal Administrative Procedure Act, 5 *U. S. C. A.* §551, et seq., makes no provision for public hearings. Consequently federal administrative agencies are free "to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *F. C. C. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 143, 84 L. Ed. 656, 662 (1940), quoted in *F. C. C. v. Schreiber*, 381 U. S. 279, 290, 14 L. Ed. 2d 383, 391 (1965).

Considering the type of hearing here involved, the subject matter thereof together with the rights at stake, we conclude that due process did not require a public hearing. However, it must be recognized that in administrative agency proceedings a public hearing has certain advantages. Obviously it promotes public confidence in the integrity and fairness of the process. It can

be viewed as a restraint against the filing of frivolous or insubstantial disciplinary charges against a person. Therefore, absent a showing of good cause or sufficient reason for keeping a hearing private, the general policy favors an open administrative hearing, *Schreiber*, supra, particularly if the person involved requests it.

Here the Superintendent of the State Police has detailed the reasons why the Division maintains a policy of private hearings in Division disciplinary matters, and why retention of that policy is essential to morale and the effective operation of the Division. They are as follows:

First, public disclosure will invest disciplinary proceedings with a punitive character when their purpose is purely corrective. The exercise of good judgment is an important part of an officer's daily activities. Thousands of judgment decisions are made each day by troopers and it is inevitable that some mistakes will be made. If review of a trooper's exercise of judgment results in the institution of disciplinary action, the final determination will only involve questions of departure from good practice, simple negligence or other employee error. Each such question has a wide range of factors related to intent, omission, seriousness of its impact on public safety, motive and the effect on the Division's discipline and operation. Public airing of matters of this nature would subject a trooper and members of his family to unwarranted and unnecessary criticism thereby lending a punitive aspect to disciplinary proceedings which is alien to the purely corrective thrust of such proceedings as they exist today.

Second, if the Division were to be required to hold public disciplinary hearings, protection of the public interest would require that some restriction be put on the present liberal discovery policy presently available, thereby impairing a trooper's ability to meet the charges against him and making the inquiry into the facts and the truth more difficult.

Public disciplinary hearings would jeopardize the security of information necessary in a police agency having statewide jurisdiction. Public knowledge of operational procedures, such as patrol schedules and methods, manpower deployment and assignment, and the like, has the obvious potential to seriously harm the public interest and safety, as well as that of the trooper.

Public disclosure would also breach the security of information necessary in unsolved crimes. It may not be possible at the time to determine what piece of information, if disclosed, may aid the perpetrator or others in concealing involvement, manufacturing alibis, concealing evidence or otherwise obstructing justice.

Third, the efficiency of the Division depends in measure upon its ability to generate public confidence. All troopers share their identity with all other members of the Division. What one member does, right or wrong, is attributed to all in the public mind. The public exposure of every departure from good practice, or acts of simple negligence, would undoubtedly have an adverse effect upon the public confidence and thereby lessen the effectiveness of the Division.

We conclude that the foregoing statement of reasons establishes a rational and justifiable basis for the maintaining of a policy of non-public disciplinary hearings in the Division of State Police. Certainly, the policy in question has not been shown to be arbitrary in the present case. The charges preferred against defendant were related to an investigation by the State Police of two unsolved murders. We must defer to the Division's expertise in this area when it calls for the security of information involving unsolved crimes.

The contention of the "likelihood" of command influence in a private hearing has no real relevance to the inquiry whether the hearing should be open or closed. Defendant is really challenging the inherent fairness of any department disciplinary hearing conducted by a member of the same department. Certainly defendant was entitled to be tried before a fair and impartial

tribunal. However, absent any indication to the contrary, we will not assume that the hearing officer in this case did not base his report and recommendations solely on the evidence. It is to be noted that defendant had an independent judicial review of his trial. The Appellate Division upheld the decision together with its underlying findings and conclusions as supported by "sufficient substantial evidence."

Affirmed.

OPINION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Argued May 16, 1972. Decided May 26, 1972.

Before JUDGES LEWIS, HALPERN and LORA.

On appeal from Department of Law and Public Safety.

MR. PATRICK T. McGAHN, JR., argued the cause for appellant.

MR. MICHAEL R. PERLE, Deputy Attorney General, argued the cause for respondent (MR. GEORGE F. KUGLER, JR., Attorney General of New Jersey, attorney).

PER CURIAM.

Appellant, John L. Sterr, was found guilty on three specified charges of violating the General Rules and Regulations of the Department of the State Police. He was suspended without pay and allowances for two weeks. He appeals from that determination.

Appellant was tried at a departmental hearing by State Police Captain George R. Quinn, a summary court officer appointed for that purpose by the Superintendent of the State Police. The hearing was held at State Police Troop (A) Headquarters in Hammonton, New Jersey. Appellant was represented by counsel, but the general public was excluded from the hearing.

Appellant seeks to reverse his conviction upon the ground that he was deprived of the right to a public trial. He argues that the hearing was a quasi-judicial proceeding, and that a public trial is mandated by the *N. J. Const.* Art. I, par. 10 which provides in relevant part that "In all criminal prosecutions, the accused shall have the right to a speedy and public trial * * *." He cites no New Jersey authority for his contention (nor have we found any), but argues that fundamental fairness requires it. We disagree, and hold that an administrative hearing of this type is not a criminal proceeding requiring a trial at which the general public must be admitted. It is nothing more than an inquiry into appellant's actions to determine whether he violated departmental regulations and, if he did, to impose appropriate sanctions within designated limits.

He further contends that "there is no evidence that the hearing officer was qualified to conduct the hearing." He combines this allegation with the vague statement that the officers who investigated the case, as well as the officer who heard and decided the case, were members of the New Jersey State Police. The intimation is that it resulted in his not receiving a fair trial, even though the hearing officer did not participate in the investigation. Again, he cites no New Jersey authority for his contention, nor does he show any resulting prejudice.

The hearing officer was appointed pursuant to legislative authority, and his findings reviewed and concurred in by the appropriate reviewing authority. Except where the Legislature has otherwise provided, such has traditionally been the accepted practice in administrative hearings, and we see no infirmity therein. See *In re Bernaducci*, 85 N. J. Super. 152 (App. Div. 1964), certif. den. 44 N. J. 402 (1965) and cases cited therein; *Zober v. Turner*, 106 N. J. L. 86 (E. & A. 1930). Absent a showing that the hearing officer was not qualified to conduct the hearing, he was prejudiced or otherwise disqualified from presiding, his designation is not open to challenge. We cannot sanction such proofs being elicited by counsel, at time of hearing, by cross-examining the designated hearer. In any event, our examination of the record clearly indicates he was eminently qualified.

What appellant is really complaining about in the two issues herein discussed is that the hearing did not comport with due process. We strongly disagree. Appellant was a member of the New Jersey State Police force which was duly established by the Legislature; the General Rules and Regulations which he allegedly violated were promulgated in accordance with legislative authority; he was notified of the charges made against him; he was represented by counsel; he had the opportunity to be heard and be confronted with the witnesses against him; he had the opportunity to cross-examine all witnesses; and a factual determination was made so that he is able to pursue a meaningful appeal. We find that procedural due process, in its fullest sense, has been complied with and appellant has received a fair trial. *Groppi v. Leslie*, —— U. S. ——, 30 L. Ed. 2d 632 (1972); *Specht v. Patterson*, 386 U. S. 605 (1967); *Tibbs v. Bd. of Ed. of Tp. of Franklin*, 59 N. J. 506 (1971); *In re Bernaducci*, supra at pp. 154-155.

Finally, appellant contends "the evidence does not support the findings and sentence * * *." We have carefully reviewed the entire record and conclude there was sufficient substantial evidence therein to support the findings and conclusions. *Atkinson v. Parsekian*, 37 N. J. 143, 149 (1962); *Manyon v. Schwarzkopf*, 100 N. J. L. 22, 24-25 (Sup. Ct. 1924).

Affirmed.